(2)

Supreme Court, U.S.
FILED
JAN 4 1996
CLERK

No. 95-466

In The

Supreme Court of the United States

October Term, 1995

BRIAN BENNETT,
MICHAEL HARRIS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS IN REPLY

DAVID E. KENNER
Counsel of Record
ALVIN E. ENTIN
ENTIN, SCHWARTZ & MARGULES, P.A.
Attorneys for Petitioners
First Union Center
200 East Broward Boulevard
Suite 1210
Fort Lauderdale, Florida 33301
(954) 761-7201

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

15 pp

TABLE OF CONTENTS

Page

Table of Citations ii

Argument 1

I. Petitioner Bennett had a reasonable expectation of privacy in his Danish hotel room 1

II. The "special needs" exception to the Fourth Amendment is not applicable in this case ... 2

III. The Equal Protection argument raised in the petition is properly before this Court and Petitioners should be granted the opportunity to address the merits of their Equal Protection claim 4

IV. Conclusion 5

TABLE OF CITATIONS

Page

California v. Greenwood, 486 U.S. 35 (1988) 1

FCC v. Beach Communications, Inc., 113 S. Ct. 2096 (1993) 4

Griffin v. Wisconsin, 483 U.S. 868 (1987) 2

New York v. Burger, 482 U.S. 691 (1987) 2

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) 2, 3

Vernonia School District 47J v. Acton, 115 S.Ct. 2386 (1987) 2

ARGUMENT

I. Petitioner Bennett had a reasonable expectation of privacy in his Danish hotel room.

The Government raises the issue: of Petitioners' reasonable expectation of privacy under the fact of this case and concludes that petitioners had no such expectation. This Court, in *California v. Greenwood,* 486 U.S. 35 (1988), stated: "An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable." *Greenwood,* 486 U.S. at 3940. Petitioner Bennett was in a Denmark hotel when his phone was tapped by Danish officials at the behest of American law enforcement. The request for the electronic surveillance of Petitioner Bennett was made simply because he was travelling with an individual who was being investigated by the United States Government. To say that, under these circumstances, Petitioner had no reasonable expectation of privacy is suspect. Society would surely recognize that an American citizen, at home or abroad, has an expectation of privacy in a hotel room. Furthermore, the Government's reasoning that an American citizen travelling abroad can only claim a reasonable expectation of privacy as recognized by the foreign country's laws fails on the facts of this case. This was a joint venture of the United States Government and the Danish police. The United States officials stood by silently while the Danish police obtained a warrant with information known by the American Drug Enforcement agents to be false. Petitioner Bennett not only had a reasonable expectation of privacy but a reasonable expectation that his own Government would

not circumvent the laws of both the United States as well as those of the foreign country in which he was travelling. The Government's wilful misconduct takes this case beyond the pale of acceptable behavior on the part of law enforcement. Under the totality of the circumstances, Petitioner Bennett had a reasonable expectation of privacy which was wilfully violated by American law enforcement.

II. The "special needs" exception to the Fourth Amendment is not applicable in this case.

The Government also argues that this Court should decline to hear this case because the search involved herein falls into the "special needs" exception to the Fourth Amendment. *Griffin v. Wisconsin*, 483 U.S. 868 (1987). The "special needs" exception has been held to apply to school searches, (*Vernonia School District 47J v. Acton*, 115 S. Ct. 2386 (1995)), searches of probationers, (*Griffin v. Wisconsin*, 483 U.S. 868 (1987)), and premises of highly regulated businesses (*New York v. Burger*, 482 U.S. 691 (1987)), to name a few. However, the "special needs" exception has not been held to apply, contrary to the Government's suggestion, to foreign searches of American citizens at the behest of their own Government. Furthermore, the Government's contention that a probable cause requirement in foreign searches will create difficulties for foreign and domestic law enforcement is, under any circumstances, ludicrous. What is truly at issue here is an American citizen's Fourth Amendment right to be free of unreasonable searches and seizures by his or her Government anywhere in the world. While the Government's quotation of *United States v. Verdugo-Urquidez*,

494 U.S. 259 (1990) which recognizes that Government must be able to function among other sovereign nations and that some who violate American law may live outside the borders of the United States (Gov't's Brief at 10) is a fair statement of both fact and policy, those facts and policies simply do not apply here. Without question the United States controlled the operation which led to the wiretapping of Petitioner Bennett's hotel room. There was no cooperation among the Americans and Danish officials, other than Danish willingness to accede to the strong requests of the Drug Enforcement agents. There was no Danish investigation then pending, nor did any such investigation ever develop. Therefore, the concern that two sovereigns must be free to reciprocate their law enforcement efforts is not raised here. Additionally, the *Verdugo* quotation offered by the Government refers directly to nonresidents ("some who violate our laws may live outside our borders under a regime quite different from [ours]." *Verdugo-Urquidez,* 494 U.S. at 275). Again, what sets this case apart from *Verdugo-Urquidez* is the fact that Petitioners are American citizens. (See Justice Kennedy's concurrence in *Verdugo-Urquidez*: "[t]he rights of a citizen, as to whom the United States has continuing obligations, are not presented by this case." *Verdugo-Urquidez,* 494 U.S. at 278). Petitioners Bennett and Harris do not reside outside our borders under a different regime. They are, therefore, entitled to the panoply of rights under their, the United States, Constitution. In fact, the very act of travelling under an issued American passport conveys to American citizens the protection of their Government, not the converse.

III. The Equal Protection argument raised in the petition is properly before this Court and Petitioners should be granted the opportunity to address the merits of their Equal Protection claim.

The Government attempts to summarily dismiss Petitioners' Equal Protection argument vis-a-vis 50 U.S.C. § 401 and Executive Order No. 12,333 by stating that the claims were not raised on direct appeal. Petitioners raised the claim in a Motion to File Supplemental Authority to Petition for Rehearing and Suggestion for Rehearing En Banc to the Ninth Circuit Court of Appeals. The Motion to File Supplemental Authority to Petition for Rehearing and Suggestion for Rehearing En Banc appears in the Appendix to this Reply Brief at 1a. As such, Petitioners should be permitted to proceed with their claim before this Court.

Petitioners also respond to the Government's characterization of the merits of Petitioner's Equal Protection claim. Petitioner has raised the issue that the Court of Appeals' decision in this case, when placed aside 50 U.S.C. § 401 and Executive Order 12,333, works a denial of equal protection of laws. Petitioner acknowledges that a statutory classification which is neither suspect nor infringes upon fundamental constitutional rights is subject to rational basis review. *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993) (citations omitted). Petitioner further acknowledges that such statutes come cloaked in a presumption of validity. *Id.* While proving a denial of equal protection in this instance is a heavy burden to bear, it is not an insurmountable one. This is particularly true when, as here, the law provides one set

of standards for a particular class of citizens and a separate set of standards for another class of citizens. As pointed out in the Petition, those suspected of the heinous crime of treason are afforded more protection from unreasonable searches and seizures than those suspected of narcotics violations, or, for that matter, almost any other crime. Petitioners assert that they can amply challenge this classification and show that there exists no rational basis to provide *more* protection for those suspected of national security violations than for those who are suspected of other violations of law. As such, this Court should accept jurisdiction on this issue and allow the Petitioner to proceed on the merits.

IV. CONCLUSION

The Government has provided no legitimate basis for denying the petition for a writ of certiorari. Petitioners have repeatedly emphasized that this Court has never spoken directly to the issues presented in this case. Further, the case deals with fundamental principles of Fourth Amendment jurisprudence, its application to American citizens abroad and the effect of United States governmental misconduct while engaged in a joint venture with a foreign sovereign. These issues are far too important to allow them to remain undecided by the highest Court in the land. As it now stands, the Ninth Circuit's opinion in this case is bad precedent which will only further the violations of constitutional rights upon those the Constitution intended to protect, i.e., American citizens.

Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID E. KENNER
Counsel of Record
ALVIN E. ENTIN
ENTIN, SCHWARTZ & MARGULES, P.A.
Attorneys for Petitioners
First Union Center
200 East Broward Boulevard
Suite 1210
Fort Lauderdale, Florida 33301
(954) 761-7201

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	*U.S.C.A. Nos. 90-50686, and 90-50694*
Plaintiff/Appellee,	
v.	*MOTION FOR PERMISSION TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF THEIR PETITION AND SUGGESTION FOR A REHEARING EN BANC*
BRIAN BENNETT and MICHAEL HARRIS,	
Petitioners/Appellants.	

COME NOW Petitioners/Appellants Brian Bennett and Michael Harris, by and through their undersigned counsel, David E. Kenner and Alvin E. Entin, and file this Motion for Permission to File Supplemental Points and Authorities in Support of their Petition and Suggestion for a Rehearing En Banc. This Supplemental Authority is found in 50 U.S.C. §401 and Executive Order number 12333 United States Intelligence Activities dated December 4, 1981.

This authority raises significant support for the Defendant/Appellant's Suggestion and Petition for Rehearing En Banc originally filed on June 15, 1995.

DATED:

ALVIN E. ENTIN
A Professional Corporation
By: _____
ALVIN E. ENTIN
Attorney for Petitioner
BRIAN BENNETT and
MICHAEL HARRIS

Respectfully submitted,

Law Offices of DAVID E. KENNER

By: _____
DAVID E. KENNER
Attorney for Petitioner
BRIAN BENNETT and
MICHAEL HARRIS

MEMORANDUM OF POINTS AND AUTHORITIES

ARGUMENT

I. CONGRESSIONAL INTENT ON THE INTERNATIONAL ACTIVITIES OF LAW ENFORCEMENT INTELLIGENCE GATHERING AGENCIES MAY BE DISCERNED FROM A REVIEW OF 50 U.S.C. §401.

The Defendants/Appellants, BENNETT and HARRIS direct this Court's attention to 50 U.S.C. §401 dealing with National Security. In particular, Defendants/Appellants would point to more specifically, Executive Order number 12333 United States Intelligence Activities dated December 4, 1981. In this Chapter provision matters particularly relevant to the panel opinion and Petition for Rehearing are found. In particular, the Executive Order demonstrates that there was clear Congressional intent exemplified in regard to an attempt to exercise extra territorial activity by American Intelligence Agencies in their information gathering capacities. Section 2.1 et seq. of part 2 specifically sets forth the need and purpose for the collection of information and sets forth additionally significant concerns in the areas of National Defense and Foreign Relations. As was pointed out with great specificity in Section 2.1:

> *"Accurate and timely information about the capabilities, intentions and activities of foreign powers, organizations, or persons and their agents is essential to informed decision making in the areas of National Defense and Foreign Relations. Collection of such information is a priority objective and will be pursued in a vigorous, innovated and responsible manner that is consistent with the Constitution and applicable law and respectful of the principles upon which the United States was founded."*

Thus, Congress clearly intended to place restraints in Intelligence gathering agencies in the two most important areas involving the viability of our Republic: National Defense and Foreign Relations. Thereafter, Part 2 contains significant discussions concerning the collection of information. In Section 2.4 it indicates that agencies are not authorized to use such techniques as electronic surveillance, unconsented physical searches, overt surveillance, physical surveillance or monitoring devices unless they are in accordance with the procedures established by the head of the agency concerned and approved by the Attorney General. These requirements are delineated by Congress to "protect Constitutional and other legal rights and limit the use of such information to lawful Government purposes."

What is particularly illuminating about the authorization to surveille given to Intelligence Agency is that it requires specific Attorney General approval prior to institution under the provisions of paragraph 2.5. Not only is the Attorney General required to approve the use of the intrusive investigative technique prior to entering into extensive surveillance but these strictures are illustrative by way of analogy to the matters decided in the instant case. Congress requires the Attorney General's approval and imposes on the Attorney General the duty of ascertaining probable cause before engaging in or allowing agencies under the authority of the Attorney General to engage in electronic and other surveillance techniques abroad. As a result, paragraph 2.5 reads as follows:

> *"The Attorney General hereby is delegated the power to approve the use for intelligence purposes, within the United States or against the United States persons abroad of any technique for which a warrant would be required if undertaken for law enforcement*

purposes, provided that such technique shall not be undertaken unless the Attorney General has determined in each case that there is probable cause to believe that the technique is directed against a foreign power or an agent of a foregoing power. Electronic surveillance as defined in the Foreign Intelligence Surveillance Act of 1978 shall be conducted in accordance with that Act, as well as this Order." (Emphasis added)

Certainly an American Citizen abroad shall be entitled to the same protection if suspected of a crime (which carries with it a much less severe threat to the well-being of the public weal than does National Defense) than a violation of an Act involving the actual survival of the Nation or matters relating to International Terrorism. It would be axiomatic to say that if Congress requires probable cause to wiretap an American citizen engaged in potential acts of treason abroad there is no reason to assume that a lesser standard would be acceptable to Congress for an American citizen merely suspected of some Criminal Act. The protection of the laws in any event shall be equal. No rational hypothesis could possibly be suggested to require greater protection for an American citizen engaged in treasonable or terrorist activities than for a citizen merely suspected of a violation of some State or Federal law. A Defendant is entitled under the United States Constitution to the equal protection of its laws and a failure to provide the protections similar to those set forth in 50 U.S.C. § 401 would be a violation of that as well. Absent such rational basis a denial of equal protection occurs as it does in this case.

In the panel opinion the majority paid much emphasis to the concept of the reasonableness of the American agent's belief

in the propriety of the actions of the Foreign Police Agency under Foreign laws. The awareness of the requirement set forth under the Intelligence Act strikes at the very underpinning of that analysis. The agents were fully aware of the standards set in Section 2.5, and consequently any activities to circumvent same were per se unreasonable. This failure to act reasonably is more fully argued in the previously filed Petition for Rehearing and Memorandum of Points and Authorities.

WHEREFORE Defendants/Appellants, BENNETT and HARRIS pray this Court accept this Supplemental Authority raising additional matters for consideration before the Court en banc.

DATED:

ALVIN E. ENTIN
A Professional Corporation
By: _____
ALVIN E. ENTIN
Attorney for Petitioner
BRIAN BENNETT and
MICHAEL HARRIS

Respectfully submitted,

Law Offices of DAVID E. KENNER

By: _____
DAVID E. KENNER
Attorney for Petitioner
BRIAN BENNETT and
MICHAEL HARRIS